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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)
MAJOR RAIL CONSOLIDATION PROCEDURES
Notice of Proposed Rulemaking

REBUTTAL COMMENTS OF THE DOW CHEMICAL COMPANY

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I. Introduction

The Dow Chemical Company ("Dow") respectfully submits these Rebuttal Comments in response to the Notice of Proposed Rulemaking ("Notice") served by the Surface Transportation Board ("STB" or "Board") in the above-captioned proceeding on October 3, 2000. Dow submitted comments in this proceeding on November 17, 2000, and reply comments on December 18, 2000.

In those earlier comments, Dow set forth extensively its own proposals, commented on the Board's proposals, and responded to comments filed by other parties. Dow does not intend to repeat its earlier comments here. Through these rebuttal comments, Dow responds to new arguments raised by parties in their Reply Comments, responds to other parties' comments on Dow's proposals, and summarizes the key points raised by Dow in this proceeding.

II. The Comments Demonstrate That The Board Cannot Truly Enhance Competition By Focusing Only Upon Merging Carriers.

The comments filed to date reflect a strong need and desire to reform more than just the Board's rail merger policy. They demonstrate the necessity of enhancing competition throughout the entire rail industry in order to remedy the substantial and cumulative loss of competition resulting from prior mergers.

Since the early stages of the Advanced Notice of Proposed Rulemaking, a majority of commenters, including Dow, have urged the Board to expand the scope of this proceeding beyond rail mergers. Despite these well-reasoned requests, the Board declined to do so in the Notice. The comments received in response to the Notice, however, have further illustrated the error of the Board's decision.

There is an inherent tension between the goal of enhanced competition and the attempt to realize that goal through merger proceedings. First and foremost, requiring competitive enhancements only of applicant-carriers places those carriers at a competitive disadvantage vis-à-vis non-merging carriers and creates a disincentive for the applicants to merge. The Board's use of conditions also creates an unlevel playing field between those shippers who are served by the merging carriers and those who are not. In so far as competition is enhanced unevenly, mergers are poorly suited to enhance competition.

Because the Board has decided to pursue enhanced competitive measures only in the context of its merger policy, most commenters have attempted to structure their proposals within that framework. This has been much like trying to fit a square peg into a round hole. Competition cannot be enhanced, truly and meaningfully, through selective modification within the merger setting. And, by addressing enhanced competition only in this context, the Board unnecessarily limits its opportunity to improve competition, since many of the most pro-competitive proposals are better addressed outside of mergers. This has been the genesis of most of the disputes between the major railroads and the shippers in this rulemaking proceeding.

The need to enhance competition stems from the cumulative loss of competition through prior mergers. There is no rational reason to restrict competitive enhancements to future mergers. Indeed, there is no reason to tie the issue of enhanced competition to mergers at all. Such a link creates an artificial distinction that only hamstrings the Board as it attempts to address this critical issue for the entire rail industry and its customers. Therefore, Dow supports the Reply Comments of the Alliance for Rail Competition and Consumers United for Rail Equity (pp. 6-8), which call for an expanded or separate proceeding to address ways to enhance competition in the rail industry that is unfettered by the purpose and scope of the Board's merger authority. The U.S. Department of Transportation ("DOT") also raised this issue in its opening comments when it concluded that "the access question should be the subject of a separate, industry-wide, rulemaking." (DOT Opening Comments at 6)

III. The Class I Railroads Support Only Very Limited Reform of the Board's Merger Policy.

Although Dow has commended the Board for recognizing the need to revise substantially its rail merger policies to "enhance" rather than simply to "preserve" competition, it has expressed serious reservations as to the scope and clarity of the Board's proposals. To varying degrees, almost all shipper and government commenters share these reservations. Not surprisingly, however, the major Class I railroads have sought to limit the Board's proposals to little more than general guidelines that will allow them to define and determine the need for "enhanced competition" in whichever manner they deem appropriate.

The comments of the major Class I railroads demonstrate little, if any, desire to modify the Board's rail merger policy, in any meaningful respect. They support only those proposals calling for the submission of voluntary plans by merging carriers to address service and performance issues. At the same time, they reject any attempt to enforce those plans or to hold carriers responsible for their commitments. This differs little from the existing merger policy.

A. The Class I Railroads Have Rejected the Board's Most Significant Proposals.

To begin with, the major railroads reject outright the Board's most significant proposal, a shift in focus to enhanced competition. (Norfolk Southern ("NS") Reply Comments at 10-11, Burlington Northern and Santa Fe ("BNSF") Reply Comments at 19-21; Union Pacific ("UP") Reply Comments at 12-13; CSX Reply Comments at 10-13) Subsumed within this shift are several other important proposals. These include the preservation of existing major gateways both physically and economically, preservation of the contract exception to the bottleneck rule, and the requirement that merger applicants propose measures to enhance competition. The last of these three proposals would require substantive changes to the Board's current position on the application of conditions to rail mergers and is the most objectionable to the major railroads.

The major railroads accept preservation of the contract exception and only a very limited preservation of existing gateways, primarily because these proposals can be linked directly to specific merger harms. They object strenuously to competition enhancing measures that are not related to specific merger harms. This position is no different from the Board's current merger policy and certainly does not require a rulemaking to implement.

The Board also gives new emphasis to transitional service problems and the determination of merger benefits, which the major railroads support as a general matter. Those proposed merger policies, however, take the form of reporting requirements and contingency plans. All attempts by other commenters to improve upon the Board's proposals, either by holding the carriers accountable for the accuracy of the information they provide in their merger applications or for the financial consequences of the carriers' failure to achieve their promises, have been uniformly rebuffed by the major railroads. Moreover, the major railroads contend that "voluntary" proposals from the merger applicants will afford shippers all the protection they need.

The major railroads are willing to make a host of voluntary promises and proposals in support of their merger applications, but they are not willing to be held accountable for their actions. This is unlike any other major industry where competitive markets and/or antitrust

oversight ensure that the merging entities, not their customers, are accountable. In fact, the rail industry is not fully competitive, and in some markets is not competitive, at all. It is unlikely that competition will constrain the major railroads and ultimately make them accountable. Also, rail mergers are not subject to antitrust laws which never would have permitted the current high level of concentration in the rail industry. Until full competition exists within the rail industry, the Board can and must address these deficiencies through its merger review authority.

B. The Board's Focus Should Be On Enhanced *Intramodal* Competition.

The Association of American Railroads ("AAR") criticizes Dow, the National Industrial Transportation League ("NITL"), and others because they have asked the Board to clarify that the goal of enhanced competition is enhanced *intramodal* competition. (AAR Reply at 8-10). The AAR asserts that these parties would deny a future merger that significantly enhances intermodal competition if no enhancements were made to intramodal competition. This is but one example of the major railroads distorting and mischaracterizing comments in this proceeding.

A rail merger has the potential to increase intermodal competition only by making rail transportation available when it was unavailable prior to the merger. Dow's concerns address the situation where a shipper has only a rail transportation option before a merger. In this situation, it is difficult to see how a merger of two railroads will increase intermodal competition for that shipper. Yet, shippers in this position are the ones who have been most hurt by the loss of competition in prior mergers and therefore require enhanced competitive measures today.

DOT has expressed support for the clarification sought by Dow and others that proposals for enhanced competition refer only to intramodal competition. (DOT Reply at 4-5) Dow agrees with DOT that enhanced intermodal competition should be encouraged, but that such competitive enhancements should complement, not supplant, enhanced intramodal competition.

IV. The Major Railroads Misleadingly Characterize Restitution for Service-Related Damages as Penalties.

The AAR, while supporting the concept behind the Board's proposed Service Assurance Plan, objects to modifications that would provide shippers with remedies for service failures. (AAR Reply at 13-15) This is an example where the Class I railroads stop short of any proposal that would hold them accountable for their actions.

Dow has not gone as far as some commenters who have asked the Board to impose financial penalties on merging carriers if they do not fulfill all of their merger promises. Nevertheless, Dow remains adamant that there must be effective remedies when service failures cause financial injury to shippers through no fault of their own.

The AAR cites to Dow's initial comments as an example of a party that is attempting to ensure that financial penalties are "real." (*Id.* at 13-14, n. 32) Dow's comments actually address arbitration of service-related loss and damage claims. Nowhere in its comments does Dow propose or advocate "financial penalties."

It is particularly perverse for the AAR, as it has done here, to equate "restitution" of legitimate damages caused by merger-related service failures with "financial penalties." A penalty is a fine meant to discourage undesirable behavior; restitution, by contrast, is compensation after the fact by the responsible party for actual damages caused to an innocent party. The AAR's logic, which equates these two very different concepts, exemplifies the "entitlement" mentality that exists within the rail industry and that the absence of substantial competition has fostered.

V. The Major Railroads Inappropriately Invoke Comparisons with Other Federal Agencies' Merger Policies.

Several major carriers continue to draw inappropriate comparisons to the merger policies of the Justice Department ("DOJ"), the Federal Energy Regulatory Commission ("FERC"), and the Federal Communications Commission ("FCC"). (CSX Reply Comments at 32-34; BNSF

Opening Comments at 19-20) If anything, comparisons to those agencies support the enhancement of intramodal competition through merger conditions.

A very pertinent example is the pending merger between America Online and Time Warner. As cable modem access to the Internet has expanded, cable operators have strenuously objected to allowing any unaffiliated Internet Service Provider ("ISP") access to the cable operators' customers over their proprietary cable systems. There have been many battles waged on the judicial, legislative and regulatory fronts over "open" or "forced" access to cable systems by third-party ISPs. This has become a central issue in the AOL-Time Warner merger, which has been reviewed by both the Federal Trade Commission ("FTC") and the FCC. In order to gain FTC approval, AOL Time Warner recently made a key concession, agreeing to allow third-party ISPs access to the Time Warner cable system. Thus, it is clear that the very agencies that the major railroads offer as having the proper approach to merger review are doing that to which the railroads most strenuously object.

BNSF cited to FERC merger policy as a similar example in its initial comments. The Edison Electric Institute effectively addressed the ironies of BNSF's citation in its Reply Comments (p. 15).

It also is surprising that the major railroads would invoke DOJ's merger policy, since DOJ filed strong objections to the Union Pacific/Southern Pacific merger and probably would not have approved the Conrail split as approved by the Board. Shippers have been arguing for DOJ review of rail mergers for years. If the major railroads truly want that level of scrutiny, Dow would not object.

Dow supports the reply comments of the American Chemistry Council and the American Plastics Council ("ACC/APC") on this subject (p. 5-6). The railroad industry cannot be allowed to invoke selective portions of the merger review standards applied to most competitive industries, but continue to object to a wholesale application of those standards to rail mergers in general. As long as rail mergers remain sheltered from the antitrust laws, the industry must accept pro-competitive conditions like those proposed in this proceeding.

VI. Summary of Dow's Comments

Although Dow approves of the direction the Board has taken in the Notice, Dow believes that the proposals are not of sufficient scope or breadth to accomplish the Board's stated objective of enhancing competition. Nor does the Notice provide meaningful competitive remedies to most captive rail shippers. The major points raised by Dow are as follows:

- Competition cannot be truly enhanced unless it extends to the entire rail industry.
- The Board must clarify that its emphasis is on enhanced intramodal competition.
- The Board must clarify that a "financially sound" carrier does not mean a "revenue adequate" carrier.
- The Board should require mandatory arbitration of service-related damage claims, at the shipper's discretion.
- The Board should adopt the Canadian system of Final Offer Arbitration for rate disputes.
- Shippers must be protected from the effects of acquisition premiums upon their rail rates.
- When addressing specific competitive harms, the Board should increase competition if there is no other condition that would fully restore pre-merger competition.
- As a minimum remedy for service disruptions, the Board should allow a shipper to short-haul a carrier to the nearest interchange point on another carrier's system.
- The Board should expressly abandon the one-lump theory.
- If the Board decides to rely more upon alliances and joint ventures, it should ensure that any anti-competitive effects are subject to effective review and remediation.

Respectfully submitted,

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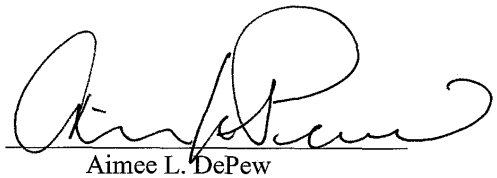
Certificate of Service

I certify that I have on this 11th day of January 2001, served copies of the "Rebuttal Comments of The Dow Chemical Company" upon all parties of record in this proceeding, by First Class mail.



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